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RIGHTS AND OBLIGATIONS OF STRIKERS UNDER THE TAFT-HARTLEY ACT

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Much public discussion has been stirred by the enactment of the Taft-Hartley Act,¹ which amended certain provisions of the National Labor Relations Act.² On one hand, it has been praised by many as a panacea for all the existing industrial relation ills and on the other hand it has been severely condemned from certain quarters as a "Slave Labor Act"; thus, it would seem timely to reappraise certain employee rights in an effort to determine the true impact of the amended Act on those rights. The scope of this article is limited to a survey and analysis under the National Labor Relations Act, as amended, of the rights and obligations of employees engaging in strikes and concerted refusals to work and the correlative rights and duties of employers whose employees are engaging in a strike. It does not include a discussion of the problems connected with the rights of labor organization and its agents to encourage or induce employees to engage in certain strikes and refusals to perform services which are expressly forbidden by Section 8 (b)(4) of the amended Act. The writer fully appreciates that various portions of the amended Act must necessarily await judicial interpretation of their exact meaning; however, with an understanding of the decided cases under the Wagner Act on this subject and an appropriate appreciation of the Board's rationale on fundamental concepts together with the legislative history of the amendments, it is possible to suggest something of the effects of the Labor Management Relations Act of 1947 upon the right to strike.

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1. Labor Management Relations Act, 1947, Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947).

2. 49 STAT. 449 (1935), 39 U.S.C. §§ 151-166 (1940).

EMPLOYEE STATUS DURING STRIKE

At the outset it should be noted that Section 7 of the amended Act, which declares the rights of employees, expressly protects the right to engage in concerted activity by providing:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

It should be observed as significant that Section 7 of the Wagner Act was amended to protect equally "... the right to refrain from any or all such activities. . . ."³ Likewise, although Section 13 of the amended Act expressly safeguards to employees the right to strike, it acknowledges some restrictions and limitations on the right by providing:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."⁴

The amended Act further declares that employees engaged in a strike do not lose their status as employees since by virtue of Section 2(3) the term *employee* is defined as including "... any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. . . ."⁵ Exception to this rule is made by

3. For a discussion of the factors prompting this change see the report of Senate-House conference committee. H. R. Rep. No. 510, 80th Cong., 1st Sess., 93 Cong. Rec. 6451, 6462 (June 3, 1947).

4. By way of comparison § 13 of the Wagner Act provided: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

5. With respect to the term *employee* as used in the Wagner Act, the Senate committee report stated: "... The bill thus observes the principles that men do not lose their right to be considered employees for the purposes of this bill merely by collectively refraining from work during the course of a labor controversy. Recognition that strikers may retain their status as employees has frequently occurred in judicial decisions. . . . To hold otherwise for the purpose of this bill would be to withdraw the government from the field at the very point where the process of collective bargaining has reached a critical stage and where the public interest has mounted to its highest point." Sen Rep. No. 573, 74th Cong., 1st Sess. (1935).

virtue of Section 8(d) of the amended Act, wherein a labor organization representing employees under a collective bargaining contract is required to take certain affirmative action, including serving a written notice upon the other party to the contract of any proposed termination or modification of the contract sixty days before the expiration date of the contract or, if the contract has no expiration date, sixty days before the proposed date of termination or modification. Those employees who engage in a strike within the above sixty day period lose their status as employees for the purposes of Sections 8, 9, and 10 of the amended Act until such time as they are reemployed by the employer. Accordingly, the Board and the courts have held uniformly that the fact that an employee engages in a concerted refusal to work does not thereby terminate his employee status.⁶ With the exceptions hereinafter noted under which the employer is justified in discharging the employees, the employer remains obligated to bargain with the labor organization which represents a majority of the employees in an appropriate unit despite the fact that the employees, who are members of that union, are engaged in a strike.⁷

RIGHT TO REPLACE STRIKERS

Since under the Wagner Act the Board and the courts recognized that the rights of both the employer and the striker differ in *unfair labor practice strikes* and *economic strikes*, it is well to distinguish between them. The former includes not only those caused by the employer's unfair labor practices⁸ but those prolonged as a result of the employer's unfair labor practices.⁹ The latter is a strike which is neither caused nor prolonged by the unfair labor practices of the employer.

In the economic strike, the striking employees could be permanently replaced and the employer need not discharge those employees hired to fill the

6. N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938); M. H. Ritzwoller Co. v. N.L.R.B., 114 F. 2d 432 (C.C.A. 7th 1940).

7. Hamilton v. N.L.R.B., 160 F. 2d 465, 468 (C.C.A. 6th 1947), *cert. denied*, *sub nom.* Kalamazoo Stationery Co. v. N.L.R.B., 68 Sup Ct. 65 (1947); N.L.R.B. v. Reed & Prince Mfg. Co., 118 F. 2d 874, 885 (C.C.A. 1st 1941), *cert. denied*, 313 U.S. 595 (1941); Jeffery-DeWitt Insulator Co. v. N.L.R.B., 91 F. 2d 134 (C.C.A. 4th 1937), *cert. denied*, 302 U.S. 731 (1937).

8. Berkshire Knitting Mills v. N.L.R.B., 139 F. 2d 134, 137 (C.C.A. 3rd 1943), *cert. denied*, 322 U. S. 747 (1944); Matter of Fast Trucking, Inc., 56 N.L.R.B. 1826, 1840 (1944).

9. N.L.R.B. v. A. Sartorius & Co., 140 F. 2d 203, 206 (C.C.A. 2nd 1944); Black Diamond S. S. Corp. v. N.L.R.B., 94 F. 2d 875, 879 (C.C.A. 2nd 1938), *cert. denied*, 304 U. S. 579 (1937); Matter of Birmingham Post Company, 49 N.L.R.B. 206 (1943), *enforced*, 140 F. 2d 638 (C.C.A. 5th 1944).

places of the strikers in order to provide places for the strikers when they elect to return to work.¹⁰ For the employer to take advantage of this right, the replacements must be permanent and not merely a transfer of employees from other departments in a "makeshift arrangement."¹¹ However, upon the termination of the strike and the unconditional offer to return to work by the strikers, the employer may not refuse to reinstate the strikers merely because of their participation in the strike.¹² But it was held consistently that unfair labor practice strikers could not be permanently replaced and that the employer must reinstate all such strikers upon the termination of the strike.¹³ Thus, where the strike was not caused by the employer's unfair labor practices, but the commission of such practices during the course of the strike resulted in prolonging the controversy, the employer was required to discharge employees hired after the commission of the unfair labor practices to make room for the returning strikers but was not required to discharge those employees hired to replace the strikers prior to the commission of the unfair labor practices.¹⁴ The legislative history of the Taft-Hartley Act clearly indicates that Congress intended to abolish the different treatment accorded unfair labor practice strikers from that accorded economic strikers and that each should retain employee status only until replaced.¹⁵ Such a change cuts a deep gash into the decision law established through the administration of the Wagner Act.

10. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938); *Home Beneficial Life Ins. Co. v. N.L.R.B.*, 159 F. 2d 280 (C.C.A. 4th 1947), *cert. denied*, 68 Sup. Ct. 58 (1947); *N.L.R.B. v. Shenandoah-Dives Mining Co.*, 145 F. 2d 542 (C.C.A. 10th 1944); *Wilson & Co. v. N.L.R.B.*, 120 F. 2d 913 (C.C.A. 7th 1941); *N.L.R.B. v. Brashear Freight Lines, Inc.*, 119 F. 2d 379 (C.C.A. 8th 1941).

11. *Firth Carpet Co. v. N.L.R.B.*, 129 F. 2d 633 (C.C.A. 2nd 1942).

12. *Hamilton v. N.L.R.B.*, 160 F. 2d 465, 469 (C.C.A. 6th 1947), *cert. denied, sub. nom. Kalamazoo Stationery Co. v. N.L.R.B.*, 68 Sup. Ct. 65 (1947); *Home Beneficial Life Ins. Co. v. N.L.R.B.*, 159 F. 2d 280 (C.C.A. 4th 1947), *cert. denied*, 68 Sup. Ct. 58 (1947); *Carter Carburetor Corp. v. N.L.R.B.*, 140 F. 2d 714 (C.C.A. 8th 1944).

13. *N.L.R.B. v. A. Sartorius & Co., Inc.*, 140 F. 2d 203 (C.C.A. 2nd 1944); *Rapid Roller Co. v. N.L.R.B.*, 126 F. 2d 452 (C.C.A. 7th 1942), *cert. denied*, 317 U. S. 650 (1942).

14. *Black Diamond S. S. Corp. v. N.L.R.B.*, 94 F. 2d 875 (C.C.A. 2nd 1938), *cert. denied*, 304 U. S. 579 (1937).

15. In connection with the change suggested by the House bill in the definition of the term "employee" so that economic strikers and unfair labor practice strikers would be treated in the same fashion, the report states: "... This Board practice has had the effect of treating more favorably employees striking to remedy practices for which the National Labor Relations Act itself provides a peaceful administrative remedy, than employees who are striking merely to better their terms of employment. . . ." The report in advising that the House suggestion was not adopted concludes: "... Since the different treatment of unfair labor practice strik-

The striking employee must generally apply for reinstatement upon termination of the strike or upon his personal desire to abandon the strike and return to work, regardless of whether the strike is designated an *unfair labor practice strike* or an *economic strike*. There is no particular form essential to fulfill the requisite application for reinstatement except that it must not be conditional. It may be made by the strikers individually, collectively or through a representative such as the union organizer.¹⁶ However, if the employer has in fact discharged the striking employee for his participation in the strike or concerted activity, there is no duty on the employee to apply for reinstatement since the unfair labor practice is complete and the employer has a resulting affirmative duty to offer reinstatement as in the case of any other "discriminatory discharge." In addition, striking employees may be relieved of the necessity of applying for reinstatement where the evidence indicates that the employer has a well defined policy of notifying employees to return to work,¹⁷ requires an "unlawful" condition as a prerequisite of reinstatement,¹⁸ or clearly indicates that an application for reinstatement would be merely a "futile gesture."¹⁹

Problems have frequently arisen in connection with the eligibility of strikers and their replacements to vote in collective bargain elections conducted by the Board under Section 9. Regardless of whether or not a strike was caused by the employer's unfair labor practices, if the strike was still current,²⁰ the strikers were eligible to vote.²¹ In the event the striker was allegedly discharged for cause, he could cast a ballot subject to being challenged. If challenged, the ballot would be impounded pending a deter-

ers and economic strikers is simply within the framework of the existing law, it was thought by the House managers that the Board should be given an opportunity to change this practice itself rather than needlessly complicating the definition of the term 'employee'." H. R. Rep. No. 510, 80th Cong., 1st Sess., 93 Cong. Rec. 6451, 6460 (June 3, 1947).

16. Matter of Foote and Davies, 66 N.L.R.B. 416 (1946); Matter of Rapid Roller Co., 33 N.L.R.B. 557, 592 (1941); 3 N.L.R.B. Ann. Rep. 78-80 (1938).

17. Matter of Western Felt Works, 10 N.L.R.B. 407, 426 (1938); Matter of Waterman Steamship Corporation, 7 N.L.R.B. 237, 250 (1938), *enforced*, 309 U. S. 206 (1940).

18. Eagle-Picher Mining & Smelting Co. v. N.L.R.B., 119 F. 2d 903 (C.C.A. 8th, 1941); Matter of Carlisle Lumber Co., 2 N.L.R.B. 248, 265 (1936), *enforced except as to back pay provisions* 94 F. 2d 138 (C.C.A. 9th 1937), *cert. denied*, 304 U. S. 575 (1938), *back pay provisions enforced*, 99 F. 2d 533 (C.C.A. 9th 1938), *cert. denied*, 306 U. S. 646 (1939).

19. Matter of Pinaud, Inc., 51 N.L.R.B. 235 (1943); Matter of Industrial Cotton Mills Company, 50 N.L.R.B. 855, 869 (1943); Matter of Lone Star Gas Company, 18 N.L.R.B. 420, 455-456 (1939).

20. Matter of Lloyd Hollister Inc., 68 N.L.R.B. 733 (1946).

21. 11 N.L.R.B. Ann. Rep. 21 (1946).

mination of the discharge issue. In situations where the strike was not caused by unfair labor practices of the employer, replacement employees were formerly held not eligible to vote²² but the Board has now reversed its former decision and declared that bona fide replacement employees are eligible to cast ballots²³ if made prior to an unconditional application for reinstatement by the strikers.²⁴ Whereas the Wagner Act was silent as to the eligibility of strikers to vote, the amended Act expressly provides under Section 9(c)(3):

"Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

It is apparent from the language of the Senate-House Conference Committee report that a change in the Board's eligibility rules should be affected by the amendment.²⁵ The suggested change would tend to force or encourage employees to submit to the procedures of the Board for redress from the employer's unfair labor practices rather than to resort to direct action;²⁶ however, in view of the Board's well established distinction between unfair labor practices strikers and economic strikers, the legislative suggestion will present an enigma to the Board. The question arises as to what is intended by the phrase "not entitled to reinstatement." If it is held that all strikers upon being replaced are not entitled to reinstatement and thus unable to vote, this places in the employer's hand a new powerful economic weapon. If the employer is able to employ any substantial number of replacements, they might challenge the union's majority status. Obviously, in many such cases the union would not continue to represent a majority of those eligible to vote because of the replacements; therefore, the strike may become illegal under Section 8(b)(4) which denounces a strike to force any

22. *Matter of A. Sartorius & Co.*, 10 N.L.R.B. 493 (1938).

23. *Matter of Columbia Pictures Corporation*, 64 N.L.R.B. 490 (1945); *Matter of Rudolph Wurlitzer Company*, 32 N.L.R.B. 163 (1941); 10 N.L.R.B. Ann. Rep. 23-24 (1945).

24. *Matter of Kellburn Manufacturing Co.*, 45 N.L.R.B. 322 (1942); also see N.L.R.B. v. *A. Sartorius & Co.*, 140 F. 2d 203, 206 (C.C.A. 2nd 1944).

25. H. R. Rep. No. 510, 80th Cong., 1st Sess., 93 Cong. Rec. 6451, 6466 (June 3, 1947) provides: "The Senate amendment also contained a provision that employees on strike who were not entitled to reinstatement should not be permitted to vote unless the strike involved an unfair labor practice on the part of the employer. This provision is also included in section 9 (c) of the conference agreement with the 'unless' clause omitted. The inclusion of such clause would have had the effect of precluding the Board from changing its present practice with respect to the treatment of 'unfair labor practice' strikers as distinguished from that accorded to 'economic' strikers."

26. See H. R. Rep. No. 510, *supra* note 15.

employer to recognize or bargain with a particular labor organization if another labor organization has been certified under Section 9.

DISCRIMINATION AGAINST EMPLOYEE FOR PARTICIPATION IN STRIKE

With the exceptions hereinafter noted, under the Wagner Act an employer could not terminate with immunity the employee status of a striker for his participation in such concerted activity. Thus, with those exceptions, discharging or otherwise discriminating in regard to the hire or tenure of employment or any term or condition of employment of an employee because of his concerted activity,²⁷ including a strike, was violative of the National Labor Relations Act, and normally the employee would be ordered reinstated with back pay.²⁸ The discrimination might have taken the form of an outright discharge or discrimination in reinstatement of the striker.²⁹ Either was equally violative of the Act if a means of reprisal against the employee for his participation in the strike. An outright discharge or other discrimination against an employee as a means of reprisal for his activities in a strike would appear to be equally violative of the amended Act if the strike is consonant with the restricted protected strike activity as subsequently discussed.

It is of no consequence that the strikers are members of a union which is denied the use of the Board's procedures because of the union's failure to comply with Section 9(f), (g), and (h) of the amended Act providing for the filing of certain anti-Communist affidavits by its officers, copies of its constitution and by-laws and certain financial reports, since under Section 10(b) of the amended Act and the Rules and Regulations of the

27. The term "concerted activities" has been accorded an extremely broad interpretation and has not been limited to situations in which the employees are members of a union or the plant is organized since by discouraging concerted activities, it has the necessary effect of discouraging membership in a labor organization. *N.L.R.B. v. Schwartz*, 146 F. 2d 773 (C.C.A. 5th 1945); *N.L.R.B. v. Central Steel Tube Co.*, 139 F. 2d 489 (C.C.A. 8th 1943); *Matter of Ever-Ready Label Corporation*, 54 N.L.R.B. 551 (1944). So under proper findings by the Board, employees engaged in a so-called "wild cat" strike might receive remedies under the Board procedures. *Western Cartridge v. N.L.R.B.*, 139 F. 2d 855, 860 (C.C.A. 7th 1944) (by implication).

28. *N.L.R.B. v. Remington Rand, Inc.*, 130 F. 2d 919 (C.C.A. 2nd 1942); *Great Southern Trucking Co. v. N.L.R.B.*, 127 F. 2d 180 (C.C.A. 4th 1942), *cert. denied*, 317 U. S. 652 (1942).

29. *N.L.R.B. v. Shenandoah-Dives Mining Co.*, 145 F. 2d 542, 547 (C.C.A. 10th 1944); *N.L.R.B. v. Poultrymen's Service Corp.*, 138 F. 2d 204 (C.C.A. 3rd 1943).

Board as amended³⁰ a charge may be filed by "any person."³¹

The Board is empowered under Section 10(c) of the amended Act to order "... reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The underlying theory upon which the Board orders reinstatement with back pay to a striker who has suffered discriminatory treatment is that it restores the *status quo* by placing the employee in the position he would have occupied but for the employer's unlawful act and dissipates the coercive effect of such discrimination on other employees.³² The usual back pay order requires that the employer make whole the dischargee for any loss of pay he may have suffered by reason of respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of the discrimination to the date of the offer of reinstatement, less his net earnings during said period.

Since the Board does not direct that monies be paid to a discriminatorily discharged employee which he normally would not have earned absent the discrimination, no problem is ordinarily presented if the discrimination is at the termination of the strike resulting from a refusal to reinstate or discrimination in the reinstatement.³³ However, where the employer improperly discharged an employee because of his participation in the concerted activities during the course of an unfair labor practice strike, the Board ordered backpay from the date of the discharge to the date of the offer of reinstatement, reasoning:

"It is impossible to ascertain when the strikers would have abandoned the strike and returned to work in the absence of the respondent's action in discharging them. Had the respondent not discharged the strikers, their back pay would have commenced from the date when they applied for work. However, by discharging them, the respondent made it useless for the strikers to apply for their jobs. Since the uncertainty is caused by the respondent's illegal act in discharging the strikers because of their union activity,

30. 29 CODE FED. REGS. § 203.9, as revised, effective August 22, 1947; 2 CCH Fed. Ad. Proc. 37, 501 (1947).

31. § 2(1) of the amended Act defines the term "person" as including "... one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

32. 11 N.L.R.B. ANN. REP. 50 (1946); 6 N.L.R.B. ANN. REP. 73 (1941).

33. N.L.R.B. v. Poultrymen's Service Corp., 138 F.2d 204, 210 (C.C.A. 3rd 1943).

we will indulge in no presumption as to how long the strike might otherwise have lasted."³⁴

But a discriminatorily discharged striker may toll the accrual of back pay and change his status from a *dischargee* to a *striking employee* if he refuses an unconditional offer of reinstatement³⁵ or if by other evidence it is shown that he joins the striking employees. But in the situation where the strike resulted in a complete shutdown of the employer's plant and the strike was neither caused nor prolonged by any unfair labor practices of the employer, the discharged employee was denied backpay for the period of the strike.³⁶

The fact that an employer may not discharge the striking employee has not prevented the employer from using economic pressure in an effort to terminate the strike by acts and utterances not intended to effectuate discharges but primarily designed as a tactical maneuver designed to coerce the employees into resuming work or to deter those remaining at work from going out on strike.³⁷ From the decided cases it is difficult to determine the exact line between a so-called *tactical discharge* and a discharge in fact. However, in making its determination the Board seems to consider evidence of the employer's intention and the manner in which the strikers construe the acts or statements. Thus in the *Biles-Coleman* case,³⁸ during a strike by its employees the company placed an advertisement in the newspaper stating "All former employees of Biles-Coleman Lumber Company who were working on May 1st will have to report to their foreman by 7:00 A.M. June 15, 1936. After this date their jobs will be declared vacant and the company will feel free to fill their positions with new men." This was held not to constitute a discharge in fact. In the *American Manufacturing* case,³⁹ as the employees rang out their cards to go on strike the foreman requested them to surrender their time cards. The following morning when they reported back to the plant and found their cards were not in the rack, they

34. Matter of El Paso Electric Company, 13 N.L.R.B. 213, 244 (1939), enforced 119 F. 2d 581 (C.C.A. 5th 1941); accord, Matter of St. Marys Sewer Pipe Company, 54 N.L.R.B. 1226 (1944), enforced, 146 F. 2d 995 (C.C.A. 3rd 1945); Matter of Industrial Cotton Mills Company, 50 N.L.R.B. 885 (1943).

35. Matter of Union Manufacturing Company, 63 N.L.R.B. 254 (1945).

36. Matter of Federal Engineering Company, 60 N.L.R.B. 592, 593 (1945), enforced, 153 F. 2d 233 (C.C.A. 6th 1946).

37. Matter of Majestic Manufacturing Company, 64 N.L.R.B. 950 (1945); Matter of Rockwood Stove Works, 63 N.L.R.B. 1297 (1945).

38. Matter of Biles-Coleman Lumber Company, 4 N.L.R.B. 679, 701 (1937).

39. Matter of American Manufacturing Concern, 7 N.L.R.B. 753, 760 (1938).

left. Although such conduct was found to be violative of Section 8(1) of the Wagner Act, it was held to be a mere "tactical step" and a use of the employer's economic strength to force the employees to abandon their strike and not a discharge.⁴⁰

The amendments may be said to have little effect, as such, on the above mentioned principles other than previously indicated where there is an unjustified discharge of or discrimination against the striking employee. Nevertheless, there has been a definite trend on the part of the Board and especially the courts to view with an increasingly critical eye strikes as a medium for resolving disputes between labor and management. Thus, there has been a progressive whittling away of the area of protected collective activities, and the amendments indicate legislative sanction of a further delimiting of this area by additional exceptions.

EMPLOYEE MISCONDUCT AND THE PURPOSE OF THE STRIKE

While the wisdom or unwisdom of the employees and their justification or lack of it in striking is generally considered by the Board as immaterial under the Wagner Act in determining whether the strikers remain *employees*,⁴¹ certain misconduct during the course of the strike by the strikers has been held to justify their discharge. The Supreme Court in the *Fansteel* case,⁴² declared that the Board had exceeded its authority in ordering reinstatement of strikers who had been discharged for their seizure and violent retention of possession of their employer's plant in a so-called *sit down strike* in defiance of state law and court order, although the employer was guilty of unfair labor practices which contributed to the cause of the strike. The court through Chief Justice Hughes rejected the Board's contention that by virtue of Section 2(3) of the Act the striking employees though discharged remained employees by observing:

"We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against

40. *But see* National Laundry Company, 47 N.L.R.B. 961, 962 (1943).

41. For a detailed statement of the Board's rationale with respect to inquiring into the justification of the strike, see *Matter of American News Company*, 55 N.L.R.B. 1302, 1306-1314 (1944). The courts have rejected attempts to equate "illegal" with "unjustified" under the Wagner Act, *Firth Carpet Co. v. N.R.L.B.*, 129 F. 2d 633, 636 (C.C.A. 2nd 1942).

42. *N.L.R.B. v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939).

the employer's property, which they would not have enjoyed had they remained at work."⁴³

So unlawful mass picketing⁴⁴ or picketing in such a manner as to forceably deny their employer the right to go upon his property which amounts to a seizure of the employer's property, justifies the discharge of the offending strikers.⁴⁵ But not all unlawful conduct during the course of the strike—e.g. ordinary picket line disputes which are common to such controversies—falls within the orbit of the *Fansteel* doctrine.⁴⁶ Thus in the *Republic Steel* case,⁴⁷ the court recognized that certain unlawful conduct on the part of the strikers placed them beyond the protective cover of the Wagner Act; nevertheless, it concluded:

"We think it must be conceded, however, that some disorder is unfortunately quite usual in any extensive or long drawn-out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight."⁴⁸

On several occasions, the courts have refused to accept the Board's determination that a strike was in effect. While the court recognized fully

43. *Id.* at 255. *Accord*, N.L.R.B. v. Clinchfield Coal Corporation, 145 F. 2d 66 (C.C.A. 4th 1944); *McNeely & Price Co. v. N.L.R.B.*, 106 F. 2d 878 (C.C.A. 3rd 1939); *Standard Lime & Stone Co. v. N.L.R.B.*, 97 F. 2d 531 (C.C.A. 4th 1938); *cf. N.L.R.B. v. Moore-Lowry Flour Mills Co.*, 122 F. 2d 419 (C.C.A. 10th 1941); *Stewart Die Casting Corporation v. N.L.R.B.*, 114 F. 2d 849 (C.C.A. 7th 1940), *cert. denied*, 312 U.S. 680 (1941).

44. *N.L.R.B. v. Indiana Desk Co.*, 149 F. 2d 987 (C.C.A. 7th 1945).

45. *N.L.R.B. v. Perfect Circle Co.*, 162 F. 2d 566 (C.C.A. 7th 1947).

46. *N.L.R.B. v. Reed & Prince Mfg. Co.*, 118 F. 2d 874, 887 (C.C.A. 1st 1941), *cert. denied*, 313 U.S. 595 (1941), holding that not every violation of local law by the strikers is sufficient to justify a discharge or refusal to reinstate; *N.L.R.B. v. Elkland Leather Co.*, 114 F. 2d 221, 225 (C.C.A. 3rd 1940), *cert. denied*, 311 U.S. 705 (1940); *N.L.R.B. v. Stackpole Carbon Co.*, 105 F. 2d 167 (C.C.A. 3rd 1939), *cert. denied*, 308 U.S. 605 (1939).

47. *Republic Steel Corporation v. N.L.R.B.*, 107 F. 2d 472 (C.C.A. 3rd 1939), *cert. denied on reinstatement question*, 309 U.S. 684 (1940), *modified on other grounds*, 311 U.S. 7 (1940).

48. *Id.* at 479. *Contra*: *Wilson & Co. v. N.L.R.B.*, 120 F. 2d 913, 924 (C.C.A. 7th 1941), in which the court states: "... there runs through the Board's argument the covert suggestion that the unlawful activities were of such a minor character that the participants were not deprived of any rights under the Act. Respect for law and order demands the repudiation of such a suggestion. The effect of an unprovoked assault can not be made dependent upon the size of the club with which it is committed."

the employees' right to engage in a strike by voluntarily leaving their work, the court refused to find a strike in effect where the employees continued to work and remained at their positions, accepted the wages paid to them, and at the same time performed a selected part of their allotted tasks and refused openly or secretly to do some other work assigned to them. Under such circumstances, the employer's discharge of the employee was proper for the employee had refused to obey the employer's reasonable instructions.⁴⁹

Other conduct of strikers, including their failure to observe certain provisions of their valid collective bargaining contract, warrants the employer's termination of the employees' service. Thus, where the employees were irrevocably committed not to observe and work in accordance with their contract, the employer was at liberty to treat them as having severed their relations with the company because of their breach although their breach of the contract took the form of a strike.⁵⁰ Likewise, an employer may discharge or refuse to reinstate employees who strike in violation of a "no-strike pledge" in their contract where the employer has not breached the contract.⁵¹

It is not entirely free from doubt as to the extent Section 8(d) of the amended Act will affect or be qualified by the above mentioned principles; however, it would appear that under this section an employer would be authorized to discharge employees for striking within the sixty day period prior to termination or modification of the collective bargaining contract if the strike is directed toward or connected with the termination or modification of the contract. Since Section 8(d) concerns the duty of the labor organization to bargain collectively and indicates that the object thereof is to provide an atmosphere conducive to a renewal or modification of the contract, it is doubtful whether the section was intended to be applicable beyond this—as where employer A's employees, who are represented by union B under a collective bargaining contract, strike for the express and sole purpose of forcing A to settle a certain grievance in a particular manner and said strike occurs within sixty days of the terminal

49. *N.L.R.B. v. Montgomery Ward & Co.*, 157 F. 2d 486 (C.C.A. 8th 1946); *N.L.R.B. v. Mt. Clemens Pottery Co.*, 147 F. 2d 262 (C.C.A. 6th 1945); *C. G. Conn, Ltd. v. N.L.R.B.*, 108 F 2d 390 (C.C.A. 7th 1939).

50. *N.L.R.B. v. Sands Manufacturing Co.*, 306 U.S. 332 (1939).

51. *Matter of Joseph Dyson & Sons, Inc.*, 72 N.L.R.B. 445 (1947); *Matter of Scullin Steel Company*, 65 N.L.R.B. 1294 (1946); *cf. Matter of Union City Body Company*, 69 N.L.R.B. 172 (1946).

date of the contract and is unconnected with the termination or modification of the existing contract. It is also doubtful whether the employer's failure to have "clean hands" will be admissible to avoid operation of the section in cases falling within its express meaning.⁵²

Standing in a rather isolated position is the decision of the Fourth Circuit Court of Appeals in the *Draper* case,⁵³ in which it was held that the discharge of employees engaged in a so-called *wild cat* strike was not violative of either Section 8(1) or 8(3) of the Wagner Act where the employer had recognized a bona fide union as the exclusive bargaining agent for all of its employees, including the striking employees, and the employer stood willing to bargain with this union on the subject matter of the strike. In that case the court appears to have placed improper reliance on the *Brashear Freight Lines* case⁵⁴ for its decision, since the latter did not justify a discharge of employees for striking but merely reiterated the well established principle that in an economic strike, the employer may permanently replace the strikers. There the court did not find that the striking union represented a majority of the employees, and therefore the employer did not commit an unfair labor practice in refusing to bargain with the union. Hence, the strike was not an unfair labor practice strike but an economic strike. Under Section 8(b)(3) of the amended Act, it is now made an unfair labor practice for a labor organization to refuse to bargain; accordingly, it is possible that the Board may now reach the same result but, of course, based upon different reasoning.⁵⁵

In the *Southern Steamship* case,⁵⁶ the Supreme Court held that the Board had exceeded its authority in ordering reinstatement of certain striking seamen who had been discharged as the result of a strike aboard ship which amounted to mutiny in violation of certain federal statutes and the court, speaking through Justice Byrnes, admonished the Board:

52. In the *Scullin Steel* case, *supra* note 51, the Board makes express reference to the company's non breach of the collective bargaining agreement. On the other hand, the Supreme Court in the *Fansteel* case refused to consider the employer's conduct in determining that the strikers engaged in "unlawful concerted activities."

53. *N.L.R.B. v. Draper Corporation*, 145 F. 2d 199 (C.C.A. 4th 1944).

54. *N.L.R.B. v. Brashear Freight Lines, Inc.*, 119 F. 2d 379 (C.C.A. 8th 1941).

55. See subsequent discussion as to effect on protected concerted activities of striking employees' participation in violation of subdivisions of § 8(b) of the amended Act. For a marked extension of the *Draper* case see *N.L.R.B. v. Reynolds International Pen Co.*, 162 F. 2d 680 (C.C.A. 7th 1947).

56. *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942).

"... the Board has not been commissioned to effectuate the policies of the National Labor Relations Act so single-minded that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accomodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accomodation without excessive emphasis upon its immediate task."⁵⁷

In a subsequent case where the employees, after agreeing through their union on a wage increase with the employer and making a joint application to the National War Labor Board, struck to force their employer to grant the wage increase without following the procedure prescribed by the National War Labor Board, thus subjecting the employer to criminal penalties for violating the Wage Stabilization Act if he acceded to their demands, the Board determined that such employees were not entitled to reinstatement in view of the illegal purpose of the strike.⁵⁸ The majority of the Board after reviewing the legislative history of the Act reasoned:

"... we think it most improbable that the Congress meant to invest this Board, or the courts reviewing our action, with any broad discretion to determine what we or the courts might choose to consider the proper objectives of concerted activity. . . . we think it most unlikely that Congress intended to exclude from the concerted activities protected by Section 7 all conduct deemed tortious under state rules of decision or statutes, or city ordinances, merely because of the objective sought to be accomplished. . . . It is quite another matter, however, to suggest that Congress either in 1935 or 1942, intended us to ignore the character of a strike knowingly prosecuted to compel an acknowledged violation of an act of the Congress itself."⁵⁹

Shortly thereafter the Board indicated its determination to restrict the application of the *American News doctrine* to its very facts. Thus, in the *Indiana Desk* case,⁶⁰ the discharge of employees for striking in an

57. *Id.* at 47.

58. *Matter of American News Company*, 55 N.L.R.B. 1302 (1944).

59. *Id.* at 1312. The Board noted with emphasis that the preamble of the Emergency Price Control Act of 1942 declared that "... It shall be the policy of ... the National Labor Relations Board ... to work toward a stabilization of prices, fair and equitable wages, and cost of production." 56 STAT. 23 (1942), 50 U.S.C. § 901 (1942).

60. *Matter of Indiana Desk Company*, 58 N.L.R.B. 48 (1944). Order Denying Respondent's Pétition For Modification of Board's Decision and Order.

effort to force the employer to agree to a wage increase was found to be violative of the Act since the strike was not precipitated by an unlawful demand that the agreed wage increase be put into effect prior to approval by the War Labor Board, and because wages characteristically have been within the scope of collective bargaining and the Wage Stabilization Act did not render collective bargaining obsolete.⁶¹ The circuit court of appeals in refusing enforcement of the Board's order indicated that it was not impressed by the Board's distinction between a strike to force agreement to a wage increase and a strike to force agreement and putting it into effect.⁶²

On other occasions the Board has been confronted with the responsibility of determining what accommodation must be made between the Act and other Congressional objectives. Thus, it ruled that striking employees, members of a union which had failed to file certain notices with the Secretary of Labor, the National War Labor Board and the National Labor Relations Board as required by the War Labor Disputes Act, were not thereby removed from the protective pale of the Act.⁶³ The majority of the Board were of the opinion that the conduct of the strikers was not to be condoned but concluded:

"... that the Congress did not intend specifically, or generally as part of its legislative policy, that the rights of employees, whether they be rank and file or representatives, under the National Labor Relations Act be affected by the War Labor Disputes Act."⁶⁴

Finally, the restriction of greatest magnitude under the amended Act on the right to strike is imposed by Section 8(b)(4)⁶⁵ which provides *inter alia* that it shall be an unfair labor practice on the part of a labor organization or its agents to induce or encourage the employees of any employer to engage in a strike or concerted refusal in the course of their employment to perform services where the object thereof is: (A) to force

61. *Accord*, *Matter of Union-Buffalo Mills Company*, 58 N.L.R.B. 384 (1944); *cf. Matter of Rockwood Stove Works*, 63 N.L.R.B. 1297 (1945).

62. *N.L.R.B. v. Indiana Desk Co.*, 149 F. 2d 987, 993 (C.C.A. 7th 1945).

63. *Hamilton v. N.L.R.B.*, 160 F. 2d 465, 471 (C.C.A. 6th 1947), *cert. denied*, *sub. nom. Kalamazoo Stationery Co. v. N.R.L.B.*, 68 S. Ct. 65 (1947); *Matter of Union City Body Company*, 69 N.R.L.B. 172 (1946); *Matter of Republic Steel Corporation (98" Strip Mill)*, 62 N.L.R.B. 1008 (1945).

64. *Matter of Republic Steel Corporation (98" Strip Mill)*, 62 N.L.R.B. 1008, 1026 (1945).

65. A similar restriction may arise in connection with the other unfair labor practices of unions under § 8(b) of the amended Act where the union commits the unfair labor practice through the medium of a strike.

any employer or self-employed person to join any labor or employer organization or any employer to cease using the products of or doing business with any other person; or, (B) to force any other employer to recognize or bargain with a labor organization unless such labor organization has been certified under Section 9; or, (C) to force any employer to recognize or bargain with a labor organization if another labor organization has been certified under Section 9; or, (D) to force any employer to assign particular work to employees in a particular labor organization, trade, craft or class rather than any other group or employees unless the employer is failing to conform to an order of the Board determining the bargaining representative for employees performing such work. Under the Wagner Act, the Board distinguished between strikes which had as their objective to force another party to violate the Act⁶⁶ and strikes which merely parallel the remedies of the Act by seeking to obtain an objective which might also be obtained through the use of the Board's procedures.⁶⁷ The unfair labor practices referred to in all of the subdivision of Section 8(b) and especially Section 8(b)(4) relate only to conduct which is attributable to a labor organization or its agents, and the legislative history appears to be clear that the objectives circumscribed by Section 8(b)(4) are not within the legitimate field of concerted activities when employees strike to accomplish one of the proscribed objects and the strike is part of an unfair labor practice.⁶⁸ However, a question is raised where a group of employees strike to accomplish one of the objectives specified in Section 8(b)(4) but do so on their own initiative, so that no union or its agents can be found to have *encouraged* or *induced* their act. Unless the group is found by their collective activity to constitute a *labor organization*, there would be no unfair labor practice since the subdivisions of Section 8(b) are inapplicable to individuals unless they are agents of a labor organization or collectively constitute a labor organization. Assuming that no such finding is made, the question is posed in connection with strikes for one of these proscribed purposes whether the sphere of unprotected concerted activities includes only those situations where the facts involved spell out participation in an unfair labor practice

66. Matter of Thompson Products, Inc., 72 N.L.R.B. 886 (1947).

67. Matter of Columbia Pictures Corporation, 64 N.L.R.B. 490 (1945).

68. Compare N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., 130 F. 2d 503, 506 (C.C.A. 2nd 1942), in which Justice Learned Hand under the Wagner Act held that a sympathetic strike or secondary boycott was concerted activity for mutual aid and protection within the scope of § 7 of the Act.

or also includes situations where the object of the strike is circumscribed without regard to proof of an unfair labor practice. The former is clear but if the latter is true, it is patent that while the amendments were primarily intended to place restrictions upon labor organizations, the restrictive effect upon individual employees who participate in a work stoppage is more inclusive than that imposed on the labor organization. The legislative history suggests that the answer is in the negative; thus the House bill⁶⁹ stated specifically that the rights of employees under Section 7 of the amended Act did not include *the right to commit or participate in unfair labor practices*, unlawful concerted activities, or violations of collective bargaining contracts. The subsequent Senate-House conference which eliminated this express provision did so not because of any disagreement with the House policy or in an effort to avoid restriction of the sphere of protected concerted activities but because as the conference report stated:

"... it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and the violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act."⁷⁰

That employees who engage in strikes constituting an integral part of an unfair labor practice under Section 8(b) and especially subdivision 4 are engaged in unprotected concerted activities is further emphasized by another statement in the conference report:

"... it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in Section 7, it is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act."⁷¹

69. House bill H. R. 3020 passed the House of Representatives on April 17, 1947 by a vote of 308 to 107.

70. H. R. Rep. No. 510, 80th Cong., 1st Sess., 93 Cong. Rec. 6451, 6462 (June 3, 1947).

71. *Id.* at 6463.

CONCLUSION

It may be concluded that the basic right of employees to engage in a strike remains but that the field for which economic warfare in the form of a strike may be used as a means of obtaining certain objectives has been restricted by the specific amendments of the Labor Management Relations Act of 1947 and by Congressional acquiescence in the present trend of Board and judicial construction. Likewise, the action of the strikers in invoking the strike and their conduct during the course of the strike can be said safely to be subject to increasing scrutiny. Thus, there is a constant raising of the standards to be observed by the participating strikers; and the strikers, as individual employees, are charged with new responsibilities. For the striker who falls short, the penalty is justification for his discharge or other disciplinary action.